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Via E-mail
January 3, 2011

Jennifer J. Johnson
Secretary, Board of Governors of the
Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551
Attention: Docket No. R-1393 and
RIN No. 7100-AD55
regs.comments@federalreserve.gov

Re: Federal Reserve Board Docket No. R-1393 and RIN No. 7100-AD55
Regulation Z (Truth in Lending)

Dear Ms. Johnson:

This letter is submitted by American Express Travel Related Services Company, Inc., on behalf of itself and its U.S. affiliates (collectively, "American Express"), in response to the proposed clarifications of 12 C.F.R. Part 226 ("Regulation Z") that were published in the Federal Register on November 2, 2010 (the "Clarifications") by the Board of Governors of the Federal Reserve System (the "Board").

American Express appreciates the Board's work in developing the Clarifications and the opportunity to comment on them. As affirmed in previous letters, American Express supports the goals of the Credit CARD Act of 2009 (the "Act"). American Express also supports the Board's goal of "clarify[ing] and facilitat[ing] compliance with the consumer protections contained in the February 2010 and June 2010 Final Rules." Many of the Clarifications are commendably pertinent to industry concerns, well-crafted and evenhanded.

However, a few are problematic. This letter recommends that the Board reconsider adopting the Clarifications regarding §226.51(a) and that the Board adopt the Clarifications regarding §226.55(b)(3)(iii) and §226.52(a)(1) in the modified forms proposed below.

1. "INDEPENDENT" ABILITY TO PAY

The Clarifications to §226.51(a) would prohibit a card issuer from opening an account for an adult consumer without considering the consumer's "independent" ability to make the required minimum payments. Consideration solely of information identified as relating to the consumer's household income or assets would not satisfy §226.51(a).

The Board should reconsider adopting the “independence” requirement or the other Clarifications to §226.51(a).[1] These Clarifications would materially reduce issuers’ ability to establish accounts for non-working spouses in non-community property states, thereby reducing the availability of credit to such spouses (a significant majority of whom are women) who have never entered the workplace or have left it before accumulating substantial assets. The Clarifications would also reduce the availability of credit for stay-at-home spouses and domestic partners whose assets are less, or whose income is more episodic, than their partners’. These persons generally could not qualify for cards unless their partners give them ownership rights in material household income or assets, or they acknowledge their economic dependence by making their partners co-obligors on joint accounts.

The Board has offered no economic evidence that might justify these adverse social effects. For example, the Board has not suggested that accounts opened for non-working spouses are charged off more frequently than accounts opened for individuals with material independent assets or income. This is likely not the case. Many domestic partners – whether or not married, and whether or not living in a community property state – pool their resources to support their household expenses, including debt obligations. For home mortgages, the pooling of household resources may take the form of express joint obligations, while such pooling may be informal with respect to revolving credit and charge accounts. Nevertheless, such pooling likely often supports the repayment of such accounts. In addition, an issuer’s evaluation of an individual applicant’s ability to pay must take account of mortgage obligations, even if financed on a pooled, household basis, yet the Clarifications would bar issuers from expressly taking account of household resources.

Moreover, the Clarifications are contrary to Congress’ intent as reflected in the statutory language. As the Board notes, the plain terms of Sections 150 and 127(c)(8) of the Truth in Lending Act (“TILA”) establish different underwriting standards for consumers generally than for consumers “who ha[ve] not attained the age of 21.” While Section 150 merely requires card issuers to consider the “ability of the consumer” to make the required payments on an account, Section 127(c)(8) prohibits issuers from opening an account for an underage consumer absent either a co-obligor or evidence of an “independent” ability to pay. Thus, while Section 150 establishes a requirement that applies to all consumers, Section 127(c)(8) establishes what the Board has previously and rightly characterized as incremental, “heightened” requirements for underage consumers.[2]

Regulation Z currently reflects this distinction. The Board would now eliminate it in order to “establish consistent standards for evaluating a consumer’s ability to pay.” Consistent standards are desirable if in accord with the Act, but that is not the case here. The Board also contends that the reference in Section 150 to “the consumer” indicates “that Congress intended card issuers to base [their] evaluation [of adult consumers’ creditworthiness] only on

[1] The Board solicits comment on whether it would be appropriate, assuming the adoption of the Clarifications to §226.51(a) generally, for issuers to have more flexibility in evaluating applications from non-working spouses. American Express is not commenting on this narrow question, given our broader view that the Board should not adopt any of the Clarifications to §226.51(a).

[2] 75 Fed. Reg. 7722 (Feb. 22, 2010).

the ability of the consumer (or consumers) applying for the account." On the contrary, the reference to "the consumer" merely identifies the subject of the underwriting inquiry, not the factors that inquiry may consider.[3] Moreover, the Board acknowledges that a consumer, asked on an application about his or her "income," may reasonably interpret the inquiry as *including* the income of both the consumer and the other members of his or her household. It would be inconsistent for the Board to interpret Congress' reference to the repayment "ability of the consumer" as implicitly *excluding* the repayment ability of other members of the household.

The provision that became Section 127(c)(8) was introduced by Chairman Dodd on May 11, 2009, and the provision that became Section 150 was introduced by Senator Menendez the next day.[4] Had Senator Menendez meant to extend to all consumers the heightened underwriting obligations that Senator Dodd proposed to apply to underage consumers, Senator Menendez could have simply proposed to delete the age reference in Senator Dodd's amendment. Instead, Senator Menendez proposed a separate amendment referring to all "consumers," thereby establishing underwriting obligations that are less prescriptive but applied more broadly than those applicable to underage consumers.

Title III of the Act shows that one of Congress' key objectives in passing the Act was to better protect underage consumers. No evidence in the legislative record reflects a concern about non-working spouses, however, or the view that the two conditions should be treated similarly for purposes of regulating issuers' underwriting.

The Board asserts that compliance with the Clarifications would not violate the Board's regulation implementing the Equal Credit Opportunity Act (the "ECOA"), 12 C.F.R. Part 202 ("Regulation B"). American Express welcomes the Board's effort to mitigate the adverse consequences for issuers of arguably inconsistent regulatory mandates. However, enforcement of Regulation B is entrusted to many entities besides the Board (including consumers), which may challenge the Board's assertion.[5] Thus, despite the Board's assertion, the Clarifications would leave issuers subject to potentially substantial enforcement and litigation risk.

Moreover, other agencies or consumers could reasonably argue that the Board's assertion of compliance with the ECOA and Regulation B is not an official interpretation of the ECOA under section 707(e), and creditors cannot therefore rely on the statement to avoid civil liability under the ECOA.

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[3] *Compare* Section 127(c)(8) (limiting the factors to be considered, where there is not a co-obligor, to those relating to an "independent" ability to pay).

[4] Senate amendment S. 1058 introduced Section 127, while Senate amendment S. 1078 introduced TILA Section 150.

[5] 12 C.F.R. §202.16;15 U.S.C. 1691c(d) ("The authority of the Board to issue regulations under this subchapter does not impair the authority of any other agency designated in this section to make rules respecting its own procedures in enforcing compliance with requirements imposed under this subchapter"); *see also* Consumer Financial Protection Act of 2010, §§1036(a), 1042(a).

We also request that the Board take cognizance of the fact that the ECOA was originally enacted in large part to ensure that women would gain access to credit, access that was generally unavailable at the time, but especially to those women who did not have significant independent assets. Adoption of the Clarification as proposed will result in reduced access to credit for some consumers, which will arguably discriminate against certain applicants on the basis of gender and marital status.

2. §226.55(b)(3)(iii)

The Clarifications of §226.55(b)(3)(iii) would prohibit a card issuer from increasing a rate, fee or charge pursuant to §226.55(b)(3) while the account is closed or the issuer does not permit the consumer to use the account for new transactions. American Express supports the Clarifications with respect to closed accounts. A consumer whose account has been closed should be permitted to pay it down without the burden of increased rates and fees. However, the Board should not adopt these Clarifications with respect to accounts that temporarily may not be used for new transactions, because the Clarifications would likely cause issuers to close such accounts instead.

It is common for issuers to temporarily halt consumers' ability to use their accounts for new transactions. Among the many reasons for doing so are that the account has gone over the credit limit, that the issuer is investigating possible fraud or identity theft, and that the issuer is working with the consumer to restructure the account to avoid account closure and write-off, which would have a significant adverse impact on the consumer's credit score. In many such instances, the issuer is able to rapidly restore the consumer's ability to use the account for new transactions, whereas if an account is closed the cardholder must re-apply and be re-underwritten – including pursuant to §226.51 – before regaining charging privileges.

Absent additional Board guidance, the Clarifications would create uncertainties about the application of other provisions to accounts that temporarily may not be used for new transactions. For example, assume that an issuer intends to increase a rate applicable to a portfolio including such accounts. Questions include whether the issuer may deliver the change-in-terms notice to cardholders of such accounts simultaneously with the other cardholders in the portfolio, and whether, if an account's ability to incur new transactions is suspended midway through the 45- and 14-day periods applicable to a rate increase, these periods are tolled. Alternatively, assume that an issuer notifies the cardholder of such an account of an increase in the late fee, the cardholder does not opt out of the change, and the 45-day period elapses. The issuer then permits new transactions on the account, and the cardholder fails to make a required minimum periodic payment. May the issuer charge the increased late fee? Issuers may choose to close accounts in order to avoid the regulatory risk that would result from uncertainties such as these.

The Clarifications would also create operational difficulties for issuers. For example, issuers generally implement a portfolio-wide change in terms pursuant to §226.55(b)(3) by compiling a list of cardholders whose accounts are not closed; delivering the notice to the listed cardholders; and, after the notice period, implementing the change. However, if accounts that temporarily may not be used for new transactions must receive different treatment from other open accounts, issuers will be required to compile the initial list solely from such other open accounts, and then, during the period before delivery of the notice, track whether listed open accounts may temporarily not be used for new transactions, and whether accounts excluded from the list are permitted to be used for new transactions. To limit these burdens, especially during the period between compiling the mailing list and delivering the notice, issuers may opt to close accounts that would otherwise remain open but be temporarily unable to incur new transactions.

Finally, we note that cardholders whose accounts temporarily may not be used for new transactions would not be subject to rate or fee increases but would retain rights such as the right to opt out of changes under §226.9(h). Thus, their rights under Regulation Z would exceed those of cardholders whose accounts remain active. We believe this would be inappropriate.

3. "ONE-YEAR PERIOD"

The Clarifications of §226.52(a) would provide that, for purposes of the limitation on fees charged "during the first year after the account is opened," an account is considered open no earlier than the date on which the account may first be used by the consumer to engage in transactions. The Board solicits comment on operational difficulties that would be posed by this approach.

American Express supports the Board's efforts to clarify that §226.52(a) covers fees charged prior to account opening. However, issuers cannot determine when a consumer may first use the card, because the issuer cannot know when the card will be delivered or when the consumer will activate the card. Moreover, determining the point at which the consumer may first use the card is not necessary to ensure that pre-account opening fees are covered by §226.52(a).[6]

The Board could achieve this goal and also give issuers assurance regarding the commencement and duration of the initial one-year period by defining that period as beginning when the issuer actually opens the account. This rule would reflect issuers' practice, and thus avoid operational difficulties. This rule would also permit the Board to provide that fees imposed prior to this point in time – for example, for application review – would be covered by §226.52(a).[7]

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[6] These concerns would not apply when an account is opened at the point of sale to permit the consumer to make an immediate purchase, the account can be used immediately, and the initial annual fee is charged upon account opening.
[7] For consistency, American Express also recommends that the Board apply a similar rule to the start date of the one-year period referenced in §226.55(b)(3)(iii).

Once again, American Express thanks the Board for its work on the Clarifications and the opportunity to comment on them. We would welcome the opportunity to discuss our comments further with Board staff.

Sincerely,

Thomas J. Ryan
Senior Counsel